APPENDIX

CASES CITED BY RESPONDENTS

(No new cases are cited in this Appendix. This is an index to petitioners' comments on the authorities cited by respondents.)

PAGE

Anthony P. Miller, Inc., v. Needham, et al., 122 F. (2d), 710 iv

Bradley, et al., v. Smith, 114 F. (2d), 161 vi

Butex Gas Co. v. Southern Steel Co., 123 F. (2d), 954 vi

Collier v. Union Central Life Ins. Co., 100 F. (2d) 411 v

Corbett v. Halliwell, 123 F. (2d), 331 iii

Frederick v. Baxter Arms Corp., 107 F. (2d), 736 ii

Occidental Life Insurance Co. v. Thomas, 107 F. (2d), 876 viii

Kuhn v. Princess Lida of Thurn & Taxis, 119 F. (2d), 705 iv

McIntosh v. Wiggins, 123 F. (2d), 316 viii

United Drug Co. v. Obear Nester Glass Co., 111 F. (2d), 997 vii

U. S. v. Foster, 123 F. (2d), 32 ix

APPENDIX

ARGUMENT

I

Respondents' authorities (Respondents' Br. 7) that a writ of certiorari will not be granted to review evidence are not in point because petitioners seek no such relief. They simply maintain, and have maintained, that

"The referee in bankruptcy was required to determine the legal effect of a certain order made by a former referee (R. 8) and in so doing reached not a 'finding of fact' but a conclusion of law." (Br. 11).

The petitioners are respectfully asking that the writ of certiorari be granted in order that they may fully submit propositions III and IV of their main brief (Br. 21), neither of which requires a review of evidence.

II

This section of the brief goes to the question as to whether the rule of the Sixth Circuit is in conflict with the rule of other circuits. In our main brief we maintained (Br. 3) that the rule of the Sixth Circuit is in conflict with the correct rule of other circuits in two respects:

1. The referee in bankruptcy, in determining the question submitted to him, was required to construe and to determine the legal effect of an order entered by a former referee (order of June 26, 1936, R. 8) and such construction, under the correct rule, (Second, Third, Fifth, Seventh and Eighth Circuits) is reviewable for the reason that it is not a "finding of fact" but a conclusion of law not binding upon the reviewing Court.

2. The rule in the Circuit Court of Appeals for the Sixth Circuit, applied in this case, is in conflict with the correct rule (Second, Fifth, Seventh, Eighth and

> Ninth Circuits) whether the referee's decision was a conclusion of law or finding of fact, because in either case the "finding" resulted in a miscarriage of justice, was based upon non-conflicting, documentary evidence, not involving any question of credibility or weight, and the appellate court was in as good a position to reach a correct conclusion as was the referee.

Respondents have apparently conceded the first of those two propositions and have cited no authority on the first point. The authorities they cite appear to demonstrate that the second proposition is equally inescapable because those cases that are in point, support petitioners' second proposition. We will comment briefly on their authorities in the order in which they were cited on pages 8 and 9 of their brief.

SECOND CIRCUIT

Counsel submit two cases, *Frederick* v. *Baxter Arms Corp.*, 107 F. (2d) 736. The entire syllabus, which was quoted in part, fairly states the whole case as follows:

> Syllabus
>
> "A bankruptcy trustee's appeal from decree dismissing his action to set aside bankrupt's conveyance of realty to corporation controlled by bankrupt's mother and brother must fail, unless trial court's finding that money with which bankrupt purchased property conveyed belonged to her mother and brother is clearly erroneous. Rules of Civil Procedure for District Courts, Rule 52 (c) (2), 28 USCA, following Section 723 C."

This was an action by Frederick, trustee, to set aside bankrupt's conveyance. Complaint dismissed on the merits. Plaintiff appeals. The case turns upon discovery of whether the bankrupt or her mother and brother were the beneficial owners of the funds with which the bankrupt purchased the property. The court thoroughly reviewed

the evidence and commented at length thereon and concluded

> "Under these circumstances we do not feel called upon to set aside the conclusion of the court below that the property transferred by Elizabeth Bunze (bankrupt) to the Baxter Arms Corporation belonged in equity and good conscience to her mother and brother."

By no stretch of the imagination is the above a case in which the appellate court declined to review a finding based upon undisputed documentary evidence not involving any question of credibility or weight.

Corbett v. *Halliwell*, 2 Cir., 123 F. (2d) 331.

This case was an action at law to recover compensation for legal services. It was tried to the court without a jury, the trial judge making detailed findings of fact.

The Court says, (Per Curiam)

> "In actions tried upon facts without a jury, findings of fact made by court shall not be set aside unless clearly erroneous."
>
> "It is sufficient to say that we have examined the record and are satisfied that the findings are not 'clearly erroneous', but are supported by substantial evidence."

This case certainly does not support the claim of respondents, nor is it in conflict with the authorities relied on by petitioners. In fact, it shows that in the Second Circuit, the Court will examine the record to determine whether the findings of the trial court, *even when sitting as a jury*, are erroneous. In the case at bar the Appellate Court was asked to review the conclusion or "finding" of the referee based upon undisputed documentary evidence involving no question of weight or credibility.